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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

RICHARD K. GOTTLIEB, Plaintiff and Respondent, v. MICHAEL KEST, Individually and as Trustee, etc., Defendant and Appellant.	B203710 (Los Angeles County Super. Ct. No. BC246040)

APPEAL from an order of the Superior Court of Los Angeles County, William F. Fahey, Judge. Affirmed.

Raymond L. Asher for Defendant and Appellant.

Tesser & Ruttenberg and Brian M. Grossman for Plaintiff and Respondent.

In this action, the complaint alleges that defendant breached an oral agreement with plaintiff to jointly fund a commercial real estate project, causing plaintiff to lose the deal. Plaintiff's company and a third party then filed separate bankruptcy cases concerning the property. Defendant allegedly breached the oral agreement so he could exclude plaintiff from the project and acquire the property himself. Ultimately, defendant alone obtained the property through the bankruptcy case of the third party.

Defendant successfully moved for summary judgment as to the initial complaint. We reversed (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110 (*Gottlieb I*)).

On remand, defendant filed a special motion to strike, contending the suit was a SLAPP (strategic lawsuit against public participation) (Code Civ. Proc., § 425.16; further statutory references are to that code unless otherwise indicated). Defendant premised his motion on his acquisition of the property through a judicial proceeding, namely, the bankruptcy case, arguing that all *pre*bankruptcy conduct was protected by the litigation privilege (Civ. Code, § 47, subd. (b)). The trial court denied the motion. Defendant appealed.

We conclude defendant has not made a threshold showing that any of plaintiff's causes of action arose from defendant's right of petition or free speech. Plaintiff's claims are not based on the *manner* in which defendant eventually obtained the property but rather on his alleged misconduct in depriving plaintiff of all rights and interests in the property. Nor does the litigation privilege protect a contracting party's breach of a commercial agreement. Accordingly, the anti-SLAPP statute does not apply and we affirm.

I

BACKGROUND

The following allegations, facts, and evidence are taken from our prior opinion in this case and the papers submitted in connection with the anti-SLAPP motion.

On March 2, 2001, plaintiff Richard K. Gottlieb filed this action against defendant Michael Kest, individually and as the trustee of the Kest Children's Trust (Trust).

A. The Initial Complaint

In *Gottlieb I*, we described the initial complaint as follows.

"On June 19, 1998, William Stoll entered into an agreement to buy 146 acres of raw land located in Las Vegas, Nevada, from Nevada Ready Mix Corporation. The purchase price for the property, known as the 'Quarry,' was around $5.5 million.

"In October 1998, Gottlieb negotiated with Stoll to acquire Stoll's rights to the Quarry. Gottlieb formed a new company, RKG Acquisition, LLC (RKG), for that purpose. On November 4, 1998, Stoll and RKG entered into a written agreement conveying Stoll's rights in the Quarry to RKG. . . .

"In January 1999, Gottlieb had discussions with Kest to obtain funds to buy the Quarry. Kest indicated the Trust might be interested in providing the money. On or about January 20, 1999, the Trust loaned RKG and Gottlieb $125,000 in accordance with the terms of a promissory note. RKG and Gottlieb were to repay the loan, plus an additional $50,000, by March 22, 1999.

"In February 1999, Gottlieb asked Kest to invest an additional $375,000 in the project. They orally agreed that if the Trust paid the additional amount: (1) the Trust would become an equal partner with Gottlieb in the Quarry project, each having a 50 percent ownership interest; (2) the Trust would provide 80 percent of the funds needed to proceed with the project — a minimum commitment of $1.3 million — and Gottlieb would provide the remaining 20 percent; and (3) the same percentages would govern the sharing of initial profits until each party recouped its investment, after which the profits would be distributed equally. This oral agreement, although considered by the parties to be binding, was to be memorialized in a written document. Before that was done, the Trust advanced the additional funds to RKG and Gottlieb.

"On or about March 2, 1999, RKG and the Trust executed an "Assignment and Assumption of Assignment and Assumption of Purchase and Sale Agreement" (Assignment Agreement), which characterized the Trust's $125,000 and $375,000 payments as loans and assigned the Trust a 50 percent security interest in RKG's right to purchase the Quarry. The Assignment Agreement extended the maturity date of the promissory note to April 15, 1999,

and recited that RKG and Gottlieb were jointly and severally liable on both loans. It further stated that if the parties did not reach an agreement by April 15, 1999, regarding how to proceed with the Quarry venture, the Trust could serve written notice within three days, either requiring repayment of the $375,000 loan or realizing on its 50 percent security interest.

"Thereafter, the Trust made three more payments to RKG and Gottlieb: $150,000 on March 25, 1999; $125,000 on April 14, 1999; and $25,000 on April 26, 1999. Each payment was acknowledged by a written amendment to the Assignment Agreement, reflecting that the "$375,000 Loan is hereby revised to include the additional [payment]." The amendments also provided that the Assignment Agreement, except as so modified, was to remain in effect. With the last of these payments, the Trust had paid RKG and Gottlieb a total of $800,000, consisting of the amounts paid under the promissory note and the Assignment Agreement.

"From April 1999, continuing into the summer of 1999, Gottlieb and the Trust exchanged documents that confirmed the terms of the oral agreement, but they never signed anything formal. The Trust did not give notice under the Assignment Agreement that the $375,000 loan (as increased by amendment) was to be repaid. As a result, Gottlieb believed that the Trust was his 50 percent partner in the Quarry project notwithstanding the lack of formal documentation.

"During the summer of 1999, Gottlieb requested several times that the Trust advance additional funds for the project. In or about August 1999, the Trust refused to honor its agreement to advance up to 80 percent of the necessary funds. The loss of the project became imminent.

"On August 31, 1999, RKG filed a petition under chapter 11 of the Bankruptcy Code (11 U.S.C. § 1101 et seq.; chapter 11) in the United States Bankruptcy Court for the Central District of California (*In re RKG Acquisition LLC* (U.S. Bankr. Ct., C.D.Cal., 1999, No. LA-99-42501-ER)). RKG instituted the bankruptcy proceedings in an attempt to gain time to obtain the funds needed to preserve the Quarry project. Because the Trust did not

provide adequate funds for the project, and RKG was not able to secure funds elsewhere, RKG's rights in the Quarry eventually lapsed.

"Meanwhile, Kest and Stoll had been negotiating directly with each other. They had agreed that Kest would not provide RKG with the promised funds, and, upon RKG's loss of the Quarry, Kest would enter into a separate deal with Stoll to acquire the property. After RKG's rights in the project lapsed, Kest entered into an agreement with Stoll to purchase an interest in the Quarry without RKG's participation. Kest acquired either actual or beneficial title to the Quarry or the right to receive proceeds from the sale of the Quarry. He ultimately received profits in excess of $4 million from the project.

"As stated, Gottlieb filed the complaint on March 2, 2001. He alleged that, by assignment, he held all of RKG's rights, title, and interest in the Quarry. The complaint contained five causes of action: breach of contract, fraud, unjust enrichment, resulting trust, and constructive trust. . . .

"On April 24, 2001, Kest, individually and as trustee, filed an answer to the complaint, generally denying all allegations." (*Gottlieb I*, *supra*, 141 Cal.App.4th at pp. 121–123.)

B. Summary Judgment

"On December 17, 2001, Kest filed a motion seeking summary judgment on the complaint, arguing that Gottlieb's claims were barred by the doctrines of judicial and equitable estoppel. Gottlieb filed opposition papers.

"The motion asserted that RKG's bankruptcy papers contained statements that were inconsistent with the positions Gottlieb took in this action. For example, in the bankruptcy case RKG treated the $800,000 from the Trust as a debt (loan) and the Trust as a creditor (lender), while in this action the $800,000 was alleged to be equity (a capital contribution) and the Trust an investor (partner). The bankruptcy papers also failed to list as an asset RKG's legal claim against the Trust for allegedly breaching the oral agreement to provide 80 percent of the funds for the Quarry project." (*Gottlieb I*, *supra*, 141 Cal.App.4th at p. 124.)

The motion for summary judgment was heard on January 14, 2002. After counsel presented argument, the trial court took the matter under submission. By minute order dated January 17, 2002, the court granted the motion, concluding that judicial estoppel barred this action. Later, the court filed a formal "Order and Summary Judgment on the Complaint." The order explained that Gottlieb had taken inconsistent positions in two cases: In the bankruptcy case he did not list any legal claims as assets on RKG's bankruptcy schedules, and later, as RKG's assignee, he sought to recover on such a claim by filing this action.

On appeal, we reversed, stating: "[J]udicial estoppel is an extraordinary remedy that should rarely apply to positions taken in Chapter 11 cases absent evidence that the bankruptcy court adopted or accepted the truth of the debtor's position. The doctrine is most appropriate '"[w]here a party assumes a [prior] position in a legal proceeding, and *succeeds* in maintaining that position."' . . .

"Although RKG failed to disclose its legal claim [against Kest] on the bankruptcy schedules, the bankruptcy court did not adopt or accept the truth of the nondisclosure and was not misled by it. RKG's creditors were not harmed by the bankruptcy case because it was dismissed without confirmation of a reorganization plan. They remain able to pursue RKG and Gottlieb for the full payment of any debts." (*Gottlieb I*, *supra*, 141 Cal.App.4th at p. 145, citation omitted.)

C. Proceedings After Reversal

On remand, Gottlieb filed a first amended complaint (amended complaint), which contained the following material allegations.

". . . Gottlieb is the assignee for consideration of all right, title and interest ever held by RKG Acquisition, LLC (hereinafter 'RKG'), a California limited liability company, in and to the 'Quarry Project,' . . . [¶] . . . [¶]

". . . [D]efendant Michael Kest ('Kest'), was . . . and now is the trustee of an entity entitled 'The Kest Children's Trust' (the 'Kest Trust'). [¶] . . . [¶]

". . . [O]n or about June 19, 1998, William Michael Stoll ('Stoll') and Nevada Ready Mix Corporation ('NRMC') entered into a Purchase Agreement and Escrow Instructions (the 'Purchase Agreement') regarding the sale by NRMC to Stoll of 146 acres of raw land

located in Las Vegas, Nevada, and commonly known as the 'Quarry.' The purchase price for the Quarry under the Purchase Agreement was $5,586,000.00.

". . . In or around October of 1998, Gottlieb entered into negotiations with Stoll to acquire Stoll's right to purchase the Quarry under the Purchase Agreement. On or about October 30, 1998, Gottlieb formed RKG for the purpose of entering into an agreement with Stoll regarding the Quarry.

". . . On or about November 4, 1998, RKG and Stoll entered into an Assignment and Assumption of Purchase and Sale Agreement (the 'Assignment'). . . . On or about December 21, 1998, RKG and Stoll entered into a Totally Restated and Amended Assignment and Assumption of Purchase and Sale Agreement, through which Stoll's rights under the Purchase Agreement were formally assigned to RKG. During this time period, Gottlieb invested approximately $200,000 of his own money towards the purchase and ultimate development of the Quarry (the 'Quarry Project').

". . . After acquiring the right to purchase the Quarry, Gottlieb began to look for financing for the Quarry Project, which he could not afford on his own. In January of 1999, Gottlieb shared his plans for the Quarry Project with Kest, who at that time had no knowledge of the Quarry or of the business opportunity presented thereby.

". . . In January of 1999, Kest and the Kest Trust inquired whether they might be able to become partners with Gottlieb on the Quarry Project. Gottlieb declined and requested that Kest and/or the Kest Trust make a loan to RKG instead. Consequently, the Kest Trust agreed to and did loan RKG and Gottlieb $125,000 . . . . The loan proceeds were wired directly to NRMC in satisfaction of certain payment obligations set forth in the Purchase Agreement.

". . . In February of 1999, Gottlieb asked Kest to contribute an additional $375,000 into the Quarry Project. Gottlieb and Kest then agreed that in consideration for Kest's additional cash infusion into the Quarry Project, the parties' relationship would transition from borrower/lender to that of 'partners.' More particularly, the parties orally agreed that Kest and/or the Kest Trust would fund 80% of the cash required to proceed with the Quarry Project (with a minimum commitment of $1.3 Million); that Gottlieb would fund 20% of the cash required to proceed; that profits would be split 80/20 in favor of Kest and/or the Kest Trust until the parties' capital investments had been

recouped; and that the parties would be equal partners in the Quarry Project (hereinafter the 'Oral Agreement'). [¶] . . . [¶]

". . . In or around March of 1999, Kest and/or the Kest Trust did contribute the additional $375,000 towards the Quarry Project. On or about March 2nd, the parties executed a written agreement regarding the $375,000 investment called the Assignment and Assumption of Assignment and Assumption of Purchase and Sale Agreement (the '$375,000 Agreement'). . . .

". . . The $375,000 Agreement was designed to document and secure Kest's $375,000 contribution, pending the drafting and execution of a formal written agreement admitting Kest as a member of RKG. Because Kest had not yet formally received his 50% membership interest in RKG, his $375,000 contribution to the Quarry Project was styled as a 'loan' secured by a 50% interest in the Purchase Agreement that Stoll had assigned to RKG. The $375,000 Agreement further provided that, at Kest's . . . election, he could convert the secured loan into a 50% interest in the Purchase Agreement, in which case the loan would be forgiven and treated as the purchase price for the assignment of the 50% interest. . . .

". . . On or about March 25, 1999, Kest and/or the Kest Trust contributed an additional $150,000 to the Quarry Project, which contribution was documented in an amendment to the $375,000 Agreement . . . .

". . . On or about April 12, 1999, a Memorandum of Understanding (the 'MOU') was executed by Gottlieb which memorialized the parties' Oral Agreement (e.g., the MOU admitted the Kest Trust as an equal member with Gottlieb in RKG and set forth the members' respective funding obligations). The MOU was executed by Gottlieb and sent to Kest. Kest did not execute the MOU; rather, the parties' counsel began to engage in negotiations regarding the terms for the Kest Trust's admission into RKG.

". . . On or about April 14, 1999, Kest and/or the Kest Trust contributed an additional $125,000 to the Quarry Project, which contribution was documented in a further amendment to the $375,000 Agreement . . . .

". . . On or about April 27,1999, and while the parties were negotiating the formal written terms of the Kest Trust's admission into RKG, Kest and/or the Kest Trust contributed an additional $25,000 to the Quarry Project, which contribution was

documented in a further amendment to the $375,000 Agreement . . . . Together with Kest's original $125,000 loan, his total investment in the Quarry project came to $800,000. [¶] . . . [¶]

". . . In May of 1999 counsel for Gottlieb and Kest exchanged correspondence regarding deal points for the MOU. Although Kest never executed the April 12, 1999 MOU, he did subscribe to it. Most notably, in a June 4, 1999 letter to the escrow company involved on the Quarry purchase, Kest's counsel wrote that: '[T]he Kest trust is a 50% owner of RKG Acquisition, LLC, the buyer in the above escrow, [¶] . . . [A]s proof of the foregoing, enclosed please find the April 12, 1999 Memorandum of Understanding signed by Richard K. Gottlieb on behalf of RKG Acquisition, LLC. Moreover, in a June 1, 1999 letter from Kest's counsel to the escrow company, counsel wrote that 'my client is an investor in RKG Acquisition, LLC and therefore should receive copies of all documents relevant to the escrow.' [¶] . . . [¶]

". . . [D]uring the Summer of 1999, Kest decided that, because he was already knowledgeable concerning the Quarry Project, he had no further use for Gottlieb, and would make substantially more money off the Quarry Project if he purchased the Quarry for himself. As such, Kest resolved to cut off funding to RKG, and began direct communications with Stoll and NRMC towards his own purchase of the Quarry. Towards that end, Kest traveled to Las Vegas to meet with Stoll and NRMC.

". . . On or about August 16, 1999, RKG requested that Kest provide Stoll with evidence that Kest and/or the Trust had the financial capacity to purchase the Quarry . . . . Kest agreed to provide such information to Stoll, but never did.

". . . [T]he reason Kest did not provide such evidence to Stoll was because Kest was already in negotiations with Stoll to acquire Stoll's rights under the Purchase Agreement. . . . [I]t was Kest's plan to allow RKG to breach its obligations under the Second Restated Assignment so that Kest could acquire the rights under the Purchase Agreement from Stoll, once they reverted back to [Stoll].

". . . During the Summer of 1999, Gottlieb made several requests that Kest honor his commitment to invest a minimum of $1.3 Million into the Quarry Project, as provided

under the Oral Agreement and MOU. Kest, however, refused to take Gottlieb's telephone calls and failed to contribute any more than the $800,000 invested to date.

". . . On August 29, 1999, Stoll notified RKG that he was terminating the Assignment and, therefore, RKG's rights under the Purchase Agreement, because RKG had failed to provide Stoll with evidence that RKG [had] the financial capacity to purchase the Quarry. . . . [A]t this point in time, Stoll and Kest had already agreed to a new assignment whereby Stoll would assign his rights in the Purchase Agreement to Kest.

". . . On August 31, 1999, and to stay Stoll's attempted termination of RKG's right to purchase the Quarry, RKG filed a Chapter 11 bankruptcy petition in the Bankruptcy Court for the Central District of California . . . . On or about the same date, Stoll transferred his rights, if any, under the Purchase Agreement to Stoll Management Group, Inc. ('Stoll Management') and filed a Chapter 11 bankruptcy petition in the Bankruptcy Court for the District of Oregon . . . .

". . . On or about September 23, 1999, the Bankruptcy Court in the Stoll Management bankruptcy issued an order wherein Stoll Management was given a deadline of December 7, 1999 within which to circulate a plan of reorganization, December 22, 1999 within which to file the plan and March 1, 2000 within which to obtain an order confirming the plan.

". . . On or about November 4, 1999, RKG and NRMC entered into a Stipulation in the RKG bankruptcy, whereby RKG agreed to the same deadlines as those set in the Stoll Management bankruptcy. The Stipulation further provided that if RKG failed to meet those deadlines, it would relinquish all rights under the Purchase Agreement, such that NRMC could sell the Quarry to whomever it pleased.

". . . On or about November 23, 1999, Stoll and the Kest Trust entered into an Amended and Restated Agreement (the 'Kest/Stoll Agreement'), whereby Kest and/or the Kest Trust agreed to pay Stoll $500,000 if Kest and/or the Kest Trust purchased the Quarry . . . .

". . . RKG did not circulate or file a plan of reorganization because it was unable to raise the funds necessary to preserve the Quarry Project, and thus could not represent that it

was capable of so doing in a plan of reorganization. Accordingly, RKG's rights to purchase the Quarry lapsed under the terms of the Stipulation.

". . . The Quarry Project having failed, RKG ceased operations in January of 2000, and assigned all of its claims to Gottlieb.

". . . [I]n March of 2000, the Kest Trust and NRMC entered into an escrow agreement (the 'Escrow') for the Kest Trust's purchase of the Quarry for $5,806,000.

". . . [O]n March 27, 2000, Kest assigned the Kest Trust's rights under the Escrow to Golf Communities, LLC ('Golf'), which is a business entity owned and controlled by Kest.

". . . [O]n or about March 27, 2000, NRMC sold and transferred title to the Quarry to Golf for $5,806,000.

". . . [O]n or about July 15, 2002, Golf sold a portion of the Quarry to Pardee Homes of Nevada ('Pardee') for $5,000,000.

". . . [O]n or about April 21, 2006, Golf sold a portion of the Quarry to Pardee for $9,000,000."

The amended complaint contained seven causes of action: (1) breach of oral contract, (2) breach of the covenant of good faith and fair dealing, (3) breach of fiduciary duty, (4) breach of confidence, (5) intentional interference with contract, (6) intentional interference with prospective economic advantage, and (7) quantum meruit.

Kest demurred to the fourth, sixth, and seventh causes of action on the ground that they did not relate back to the filing of the initial complaint and were barred by the statutes of limitations. Kest also filed an anti-SLAPP motion, arguing that the amended complaint was based on his participation in the California bankruptcy case concerning his creditor claim for $800,000 and his efforts in the Oregon bankruptcy case to obtain the rights to the Quarry through a confirmation order. Kest argued that activities preceding the bankruptcy cases were protected by the litigation privilege.

Gottlieb filed opposition papers. In opposing the anti-SLAPP motion, Gottlieb submitted declarations and exhibits, including a declaration of his own. In reply, Kest filed

declarations and exhibits, including his own declaration. He also filed objections to Gottlieb's evidence.

The trial court heard the demurrer and the anti-SLAPP motion on November 1, 2007. Kest requested that the court rule on his objections. The court sustained the demurrer without leave to amend as to the claim for intentional interference with prospective business advantage, stating that the facts and events alleged therein were not asserted in the initial complaint. The remainder of the demurrer was overruled. At the end of the hearing, the court took the anti-SLAPP motion under submission. By order dated November 2, 2007, the court denied the motion, concluding that the amended complaint was not based on protected activity. The trial court found it unnecessary to rule on Kest's objections because the court did not reach the question of whether Gottlieb was likely to prevail on the merits. Kest appealed from the order denying the motion.

II

DISCUSSION

On appeal, we review de novo the trial court's determinations on an anti-SLAPP motion. (See *Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

Kest argues that the amended complaint is based solely on his bankruptcy communications and conduct, namely, protected activity. That is factually incorrect. The allegations and evidence show that Kest's alleged wrongdoing preceded the bankruptcy litigation by months. Indeed, according to Gottlieb, Kest's failure to provide the funding required by the oral agreement *caused* the subsequent bankruptcy proceedings. Here, the *pre*bankruptcy communications and conduct — such as the alleged breach of the oral agreement to fund the Quarry project — are not protected under the anti-SLAPP statute merely because they occurred before a lawsuit.

A. Protected Activity

"'Litigation which has come to be known as SLAPP is defined by the sociologists who coined the term as "civil lawsuits . . . that are aimed at preventing citizens from exercising their political rights or punishing those who have done so." . . . [¶] . . . [¶]

"'SLAPP suits are brought to obtain an *economic* advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff. . . . [O]ne of the common characteristics of a SLAPP suit is its lack of merit. . . . But lack of merit is not of concern to the plaintiff because the plaintiff does not expect to succeed in the lawsuit, only to tie up the defendant's resources for a sufficient length of time to accomplish plaintiff's underlying objective. . . . As long as the defendant is forced to devote its time, energy and financial resources to combating the lawsuit its ability to combat the plaintiff in the political arena is substantially diminished.'" (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 890–891.)

The anti-SLAPP statute provides that "[a] cause of action against a person *arising from* any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1), italics added.)

"'The Legislature enacted the . . . statute to protect defendants . . . from interference with the valid exercise of their constitutional rights, particularly the right of freedom of speech and the right to petition the government for the redress of grievances.'" (*Contemporary Services Corp. v. Staff Pro Inc*. (2007) 152 Cal.App.4th 1043, 1052.)

"Section 425.16, subdivision (b)(1) requires the court to engage in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon

which the liability or defense is based.'" (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 67.)

"[T]he statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. . . . In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. . . . 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e) . . . .'" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78, citations omitted.)

"As used in [subdivision (e)], '*act in furtherance of* a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or *judicial proceeding*, or any other proceeding authorized by law; (2) any written or oral statement or writing made *in connection with an issue under consideration or review by a* legislative, executive, or *judicial body*, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with *an issue of public interest*; (4) or *any other conduct* in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech *in connection with a public issue or an issue of public interest*." (§ 425.16, subd. (e), italics added; see *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117–1118, 1123 [discussing types of statements covered by anti-SLAPP statute].)

"[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. . . . [T]hat a cause of action arguably may have been 'triggered' by protected activity does not [mean] that it is one arising from such." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) "'"The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability —

and whether that activity constitutes protected speech or petitioning." . . .'" (*Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1478, citation omitted.)

In rejecting Kest's appeal, we agree with the reasoning of the trial court, as explained in its November 2, 2007 order:

"Defendant's motion is not a model of clarity . . . .

"[His] position, as best as can be determined by the papers filed, is that an August 31, 1999 bankruptcy petition filed by non-party Stoll Management Group, Inc. rendered all prior conduct by the defendants in this case subject to the 'litigation privilege.' [(Civ. Code, § 47, subd. (b).)] . . . Moreover, according to defendants, any other act committed by defendants while the bankruptcy petitions were pending is 'protected activity' under CCP 425.16. . . . However, defendants cite no authorities even remotely persuasive for this expansive reading of the 'anti-SLAPP' statute.

"Indeed, it is a defendant's clear burden to show that the lawsuit is 'within the class of suits subject to a motion to strike under section 425.16.' *See, e.g., Martinez v. Metabolife International, Inc.*, 113 Cal.App.4th 181, 186 (2003). Only then can a defendant meet the so-called 'first prong' of the anti-SLAPP analysis. *Id*. '[T]he critical point is whether *the plaintiff's cause of action itself was based on an act in furtherance of* the defendant's right of petition or free speech.' *Id*. at 186-87 (emphasis in original). . . .

"Accordingly, this Court holds that where, as here, defendants are alleged to have breached a contract with plaintiff, and also engaged in various related tortious conduct, and thereafter two non-parties to the instant action[, RKG and Stoll Management,] file separate voluntary bankruptcy petitions, the subsequent bankruptcy proceedings do not provide defendants with a 'litigation privilege.' Nor are the acts of defendants otherwise considered 'protected activity' within the meaning of CCP 425.16. This is so even if the bankruptcy proceeding deals in part with the assignment of certain rights by a party in bankruptcy to the plaintiff in the instant case. Such events are incidental and collateral to the gravamen of the plaintiff's action.

"Because this Court has concluded that defendants have not carried their burden as to the first prong of the anti-SLAPP statute, the burden has not shifted to plaintiff to

demonstrate the probability of prevailing on the merits. *Martinez, supra*, at 186. [¶] . . .[¶] Thus, there is no need for this Court to rule on [Kest's] objections to [Gottlieb's] evidence." (Footnotes omitted.)

Recently, the court in *Haneline Pacific Properties, LLC v. May* (2008) 167 Cal.App.4th 311 (*Haneline*) rejected the contention that prelitigation contract negotiations and demands are privileged and therefore within the scope of the anti-SLAPP statute. There, an individual and a trust each owned an undivided one-half interest in real property; they were co-owners. The trustee offered to sell the trust's property interests to a third party and the third party agreed, but the sale was not completed at the time. Instead, the individual co-owner began negotiations with the trustee to buy the trust's property interests, asserting the trust owed him a fiduciary duty. The trustee eventually sold the trust's interests to the third party based on the alleged prior agreement. The third party then filed suit against the individual co-owner for interference with contract and other claims. The individual responded with an anti-SLAPP motion. The trial court granted the motion.

The Court of Appeal reversed, stating: "'Although originally enacted with reference to defamation . . . , the [litigation] privilege is now held applicable to any communication, whether or not it amounts to a publication . . . , and all torts except malicious prosecution. . . . Further, it applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved. . . .' . . .

"'The scope of the protections afforded to litigation-related communications under the anti-SLAPP statute and that afforded by the litigation privilege (Civ. Code, § 47) are not identical. The two statutes "are substantively different statutes that serve quite different purposes . . . ." . . .' . . . Thus, while prelitigation communications can fall within the ambit of the anti-SLAPP statute, the question here is whether the communications at issue are accurately characterized as such. . . .

"'The litigation privilege 'arises at the point in time when litigation is no longer a

mere possibility, but has instead ripened into a proposed proceeding that is actually contemplated in good faith and under serious consideration as a means of obtaining access to the courts for the purpose of resolving the dispute.' . . .

"'[I]t is the *principal thrust or gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies . . . .' . . . We are unpersuaded that the communications that form the gravamen of [the] complaint fall within the ambit of the litigation privilege. Despite the mention[] of 'pursuing remedies' the overall tone of the communications is one of persuasion and a desire to cooperate to achieve mutual goals." (*Haneline*, *supra*, 167 Cal.App.4th at p. 319, citations omitted.)

After describing the negotiations between the individual and the trustee — on which the third party based its suit against the individual (see *Haneline*, *supra*, 167 Cal.App.4th at p. 319) — the Court of Appeal commented: "[W]e find the tone and the language were intended to encourage collaboration and agreement, not 'serious consideration' of litigation. . . .

"The [individual argues] that 'The spectre of litigation "loomed" over the entire course of the parties' communications,' but the same could be said of nearly any high-stakes negotiation. '[T]he purpose of the litigation privilege is to ensure free access to the courts, promote complete and truthful testimony, encourage zealous advocacy, give finality to judgments, and avoid unending litigation. . . .' . . . We do not find that any of these purposes would be served by characterizing the communications at issue here as covered by the privilege. Negotiations and persuasion are part of any business deal. To suggest that nearly *any* attempt at negotiation is covered by the privilege, especially when attorneys are involved, is unduly overbroad. We do not find the purposes of the privilege stretch that far, and thus, neither should the privilege." (*Haneline*, *supra*, 167 Cal.App.4th at p. 320, citations omitted.)

Similarly, in this case, the ongoing communications between Gottlieb and Kest concerning the purchase of the Quarry were more akin to "[n]egotiations and persuasion [as] part of [a] business deal" (*Haneline*, *supra*, 167 Cal.App.4th at p. 320) than to "'serious consideration'" or "threats . . . of litigation" (*id.* at pp. 319–320). For instance, on

several occasions leading up to the 1999 bankruptcy filings, Gottlieb and Kest discussed — not litigation — but whether the Trust was a lender (creditor) or an investor (partner) in the Quarry project. (See also *Flatley v. Mauro*, *supra*, 39 Cal.4th at pp. 320–325 [contrasting litigation privilege with anti-SLAPP statute].)

That Kest acquired the Quarry through Stoll Management's bankruptcy case is beside the point. "[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute." (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 89.)

Kest was sued in part because he eventually obtained the rights to the Quarry (through his company, Golf Communities, LLC) — consistent with the allegation concerning his *pre*bankruptcy motive: to obtain the Quarry for himself. As alleged, Kest's failure to provide Gottlieb with the full amount promised — $1.3 million — was what forced the matter into the bankruptcy courts. We fail to see how a plan to breach a contract to fund a project, leading to bankruptcy proceedings in which the breaching party then acquires the project to the exclusion of the nonbreaching party, involves a protected right of any kind. If anything, Kest's acquisition of the rights to the Quarry in the Stoll Management bankruptcy case was "a purely business type event or transaction and [was] not the type of protected activity contemplated under [the anti-SLAPP statute]." (*Blackburn v. Brady* (2004) 116 Cal.App.4th 670, 677; see *id.* at pp. 676–678 [as alleged in plaintiff's complaint, defendant's acquisition of ownership interest in plaintiff's property through sheriff's auction was not *based on* the manner of acquisition but on allegations that defendant obtained property through fraud; acquisition through auction was therefore not protected activity].)

In light of these principles, we cannot say that any of plaintiff's causes of action is based on an act or acts of protected activity. None of the claims involved petitioning or free speech on Kest's part. The claim for breach of oral contract alleged that Kest breached the agreement by failing to provide $1.3 million toward the purchase of the Quarry. The breach of covenant claim accused Kest of improperly competing with RKG to purchase the Quarry. The claim for breach of fiduciary duty is based on the parties' formation of a joint venture

for the purchase, development, and sale of the Quarry, and Kest's failure to fund the venture as promised, then purchasing the Quarry himself. The breach of confidence claim is premised on the theory that Kest would not exploit the Quarry project to Gottlieb's exclusion. The claim for intentional interference with contract seeks to impose liability on Kest for inducing Stoll to breach the assignment agreement between RKG and Stoll. Finally, the quantum meruit claim alleges that Gottlieb educated Kest about the Quarry opportunity and is entitled to the reasonable value of his services.

In sum, because Kest did not make a threshold showing that *any* of the causes of action arises even in part from protected activity, the trial court properly concluded that the anti-SLAPP motion did not satisfy the first step in the analysis, making it unnecessary to determine whether Gottlieb had demonstrated a probability of prevailing on his claims.

B. The Evidence

Typically, the foregoing discussion would end our review of an appeal from an order denying an anti-SLAPP motion. But Kest points to the Supreme Court's admonition that "[i]n deciding whether the initial 'arising from' requirement is met, a court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*Navellier v. Sletten*, *supra*, 29 Cal.4th at p. 89; accord, *City of Cotati v. Cashman*, *supra*, 29 Cal.4th at p. 79.) Thus, the high court has considered the evidence offered by the parties in undertaking the first step of the SLAPP analysis, that is, determining whether a cause of action is based on protected activity. (See *City of Cotati v. Cashman*, *supra*, 29 Cal.4th at pp. 79–80; *Navellier v. Sletten*, *supra*, 29 Cal.4th at pp. 89–90; *Flatley v. Mauro*, *supra*, 39 Cal.4th at pp. 305–311, 320, 328–333.) Although the Supreme Court has used the parties' evidence to explain and clarify the allegations of a cause of action, Kest's use of the evidence goes far beyond any legitimate purpose.

In his respondent's brief, Gottlieb characterizes Kest's arguments in this regard as "a morass of superfluous and immaterial facts, through which Kest essentially attempts to re-plead the [amended complaint] to his liking, *i.e.*, as a SLAPP suit." The trial court also had difficulty understanding the motion, saying it was "not a model of clarity." Many of Kest's arguments seem unclear or inconsequential to us too.

In relying on the evidence, Kest presents a confusing combination of: (1) *his* evidence, although it is in conflict with Gottlieb's; (2) alleged inconsistencies between the initial complaint and the amended complaint; (3) irrelevant references to our opinion in *Gottlieb I*; and (4) principles of law, such as the parol evidence rule. We do not believe the Supreme Court envisioned *this* use of the evidence in deciding whether protected activity is the basis of a claim.

1. Kest's Evidence

Kest's briefs rely on *his* evidence, for example, denying he orally agreed to contribute $1.3 million to the Quarry project. Yet, *both* parties submitted declarations and exhibits in support of their respective positions. Gottlieb's declaration and exhibits tracked the allegations of the amended complaint and stated that Kest *did* orally agree to pay the $1.3 million. Kest's declaration made specific references to Gottlieb's declaration — like an answer to a verified complaint — denying all statements that were harmful to his position and admitting what was to his benefit. This accomplished nothing. When faced with conflicting evidence on an anti-SLAPP motion, "we neither 'weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff . . . and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.'" (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.) Gottlieb's evidence showed that none of his claims is based on protected activity.

2. Comparison of the Complaints

Kest compares the allegations of the two complaints, noting that "[a] plaintiff may not . . . plead[] facts or positions in an amended complaint that contradict the facts pleaded in the original complaint or . . . suppress[] facts which prove the pleaded facts false." (*Cantu v. Resolution Trust Corp*. (1992) 4 Cal.App.4th 857, 877.) "'The court may examine the prior complaint to ascertain whether the amended complaint is merely a sham.' . . . [A]ny inconsistencies with prior pleadings must be explained; if the pleader fails to do so, the court may disregard the inconsistent allegations." (*Vallejo Development Co. v. Beck Development Co*. (1994) 24 Cal.App.4th 929, 946.)

Kest argues that the complaints are fatally inconsistent with respect to the allegations describing the oral agreement. In particular, Kest states that (1) the initial complaint alleged RKG, not Gottlieb, was a party to the oral agreement, but (2) the amended complaint alleges just the opposite — Gottlieb, not RKG, was a party to that agreement. As a result, Kest argues, the allegation in the initial complaint controls, such that Gottlieb, not being a party to the oral agreement, lacks standing to pursue this action. But in *Gottlieb I*, we interpreted the initial complaint to allege that Gottlieb and the Trust (acting through Kest) were partners under the oral agreement. (See *Gottlieb I*, *supra*, 141 Cal.App.4th at p. 121.) We did not read the initial complaint to say that RKG was a party to that agreement. (*Ibid.*) And the amended complaint *continues* to allege that Gottlieb and the Trust were the parties to the oral agreement. Further, we have set forth above *Gottlieb I*'s summary of the *initial* complaint (see pt. I.A., *ante*) and have quoted verbatim the material allegations of the *amended* complaint (see pt. I.C., *ante*). In studying the two complaints in detail, we found no inconsistencies suggesting that Gottlieb's causes of action are based on any protected activity.

3. References to Our Prior Opinion

In a similar vein, Kest compares portions of (1) *Gottlieb I*, (2) statements made by Gottlieb in the California bankruptcy case, and (3) the allegations in the amended complaint. From this, he somehow concludes that *Gottlieb I* was premised on a "nonjusticiable controversy," and we should therefore use our "inherent power" to reinstate the summary judgment and dismiss the amended complaint. We are not aware of any basis in fact or law to support such an argument.

4. Mixing Evidence and Law

In arguing that the amended complaint is based on protected activity, Kest contends that the oral agreement is inadmissible under the parol evidence rule and that Gottlieb repudiated the agreement. Having thus dispensed with his obligation to jointly fund the Quarry project with Gottlieb, Kest focuses exclusively on his involvement in the subsequent Oregon bankruptcy case to acquire the Quarry by himself — which he characterizes as protected activity. But the evidence presented by Gottlieb does not support the application

of the parol evidence rule or the conclusion that he repudiated the oral agreement. Given this conflict, Kest did not "defeat" Gottlieb's evidence as a matter of law.

We also note that the MOU, *drafted by Gottlieb to reflect the oral agreement*, stated that the Trust and Gottlieb, *not RKG*, would be partners in the Quarry project. We pointed this out in *Gottlieb I*, *supra*, 141 Cal.App.4th at page 127, which was decided under the *initial* complaint. Thus, the MOU and the allegations in *both* complaints consistently describe Gottlieb as a party to the oral agreement, not RKG.

Last, we note that Kest asked the trial court to rule on his evidentiary objections at the hearing on the anti-SLAPP motion. The trial court declined to do so because it resolved the motion at the first step of the anti-SLAPP analysis without considering any evidence. Kest's request for a ruling preserves his objections for appeal. (See *Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 710–714.) Unlike the trial court, we have reviewed Kest's evidence to the extent he thinks it relevant to the first step, making the admissibility of the evidence a factor on appeal. Nevertheless, in requesting that *we* rule on his objections, Kest did not state in his appellate briefs what they were, did not describe them specifically or generally, and did not offer any authority or argument as to why they should be sustained. He accordingly waived the issue in this court as a result of inadequate briefing. (See *Boyle v. CertainTeed Corp*. (2006) 137 Cal.App.4th 645, 649–650; *Valov v. Department of Motor Vehicles* (2005) 132 Cal.App.4th 1113, 1132.) Further, Kest raised the objections issue for the first time in his reply brief, depriving Gottlieb of an opportunity to address the subject. That is a separate ground for waiver. (See *Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.)

In closing, Kest has not made a threshold showing that any cause of action arises from an act or acts of protected activity. Consequently, the anti-SLAPP statute does not apply to his communications or conduct.

III

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

BAUER, J.*****

***** Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.